Eastern China United SEA Sdn Bhd v ARK Venture Holdings Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D1–22–966 OF 2006
MOHD HISHAMUDIN J
6 NOVEMBER 2008

Civil Procedure — Judgments and orders — Judgment in default — Setting aside — Granted by lower court — Appeal against order — Whether irregular service rendered default judgment obtained by plaintiff irregular and not valid

Civil Procedure — Service — Irregularity in service — Personal service on director of defendant company who was also director of plaintiff company — Whether conflict of interest — Whether service invalid — Rules of the High Court 1980 O 62 r 4(1)(c)

Civil Procedure — Service — Irregularity in service — Whether service was at former principal place of business of defendant company — Whether defendant under legal duty to notify Companies Commission of Malaysia of any change of business address — Rules of the High Court 1980 O 62 r 4(1)(b)

The plaintiff's claim against the defendant was for non-payment in respect of goods sold and delivered by the plaintiff to the defendant. The defendant did not enter an appearance on the writ and statement of claim that was served on it. The plaintiff thereafter entered judgment in default of appearance against the defendant. The defendant filed an application to set aside the default judgment on the grounds that the judgment was irregularly obtained. This application was allowed by the senior assistant registrar. This was the plaintiff's appeal against that decision. The defendant submitted that the default judgment obtained by the plaintiff was irregular because the service of the writ and statement of claim on 18 July 2006 was not valid. In the present case, the writ and statement of claim were served by the plaintiff adopting two modes of service. The first mode of service was by personal service on a director of the defendant company and the second was by way of personal service on a staff of the defendant company at the principal place of business or principal office of the defendant company. The defendant submitted that the personal service on a director of the defendant company was not valid because the director on whom service was thus effected was also a director of

the plaintiff company. The defendant therefore submitted there was a conflict of interest and the said director was not in a position to accept the service on behalf of the defendant. The defendant also alleged that the second service was also not valid because the Jalan Pinang, Kuala Lumpur address had ceased to be a principal place of business or principal office of the defendant on the day that the service was alleged to have been effected on them. Therefore the defendant contended that as the service of the writ and statement of claim was invalid, the default judgment obtained was irregular and that it ought to be set aside without the need to dwell into the merits of the defendant's defence. The plaintiff submitted that the first service on the director was in accordance with O 62 r 4(1)(c) of the Rules of the High Court 1980 ('the RHC') and that the second service was at the principal place of business of the defendant as disclosed in the search at the Companies Commission of Malaysia ('Companies Commission') and that the plaintiff had no knowledge that the defendant had moved their address from the Jalan Pinang address to the new premises. The issue before the court was therefore, whether the default judgment obtained by the plaintiff was a regular and valid judgment.

Held, allowing the appeal with costs:

(1) The word 'director' in O 62 r 4(1)(c) of the RHC does not include a director who wears two hats like the director in the present case. Since the director on whom service was effected was also a director of the plaintiff company it was fair to infer that he must have had knowledge of the plaintiff's institution of the present civil suit against him. Therefore, there was a conflict of interest situation when he accepted service on behalf of the defendant and because of this the first mode of service on the director of the company was not a valid service (see para 17).

(2) The defendant submitted that its company search as at 3 August 2006 revealed the defendant's principal place of business or principal office was not Jalan Pinang but the new premises. From this it may be fairly inferred that on the date of the service of the writ and statement of claim on the defendant on 18 July 2006 the officially notified place of business of the defendant was still Jalan Pinang. Moreover the defendant had failed to explain the acknowledgment of receipt, particularly the stamping of the defendant's chop that appeared at the back of the writ. In the circumstances, the defendant had failed to disclose whether or when the plaintiff or the Companies Commission was notified of the change of address of the defendant's place of business. There is the principle that if a company changes its registered office without notifying the Registrar of Companies as required by the Companies Act 1965, then it cannot rely upon the change to defeat

service that was properly effected at its former registered office, especially when the fact of that change was not known to the plaintiff at the time of service. This principle equally applies to any change of the business address of the company as the defendant was under a legal duty to notify the Companies Commission of any change of its business address. Thus the second mode of service effected at the principal place of business or principal office of the defendant was valid by virtue of O 62 r 4(1)(b) of the RHC (see paras 29–30).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah kerana tidak membayar barangan yang telah dijual dan dihantar serah oleh plaintif kepada defendan. Defendan tidak memasukkan kehadiran ke atas writ dan pernyataan tuntutan yang telah disampaikan kepadanya. Plaintif kemudiannya telah memasukkan penghakiman ingkar terhadap defendan. Defendan telah memfailkan permohonan untuk mengenepikan penghakiman ingkar atas alasan bahawa penghakiman tersebut diperolehi di luar aturan. Permohonan ini telah dibenarkan oleh penolong kanan pendaftar. Ini adalah rayuan plaintif terhadap keputusan tersebut. Defendan menghujahkan bahawa penghakiman ingkar itu yang diperolehi oleh plaintif adalah di luar aturan kerana penyampaian writ dan pernyataan tuntutan pada 18 Julai 2006 adalah tidak sah. Di dalam kes ini, writ dan pernyataan tuntutan telah disampaikan oleh plaintif dengan menggunakan dua cara penyampaian. Cara pertama secara penyampaian ke diri ke atas pengarah syarikat defendan dan kedua secara penyampaian ke diri ke atas kakitangan syarikat defendan di tempat perniagaan utama atau pejabat utama syarikat defendan. Defendan menghujahkan bahawa penyampaian ke diri ke atas seorang pengarah syarikat defendan adalah tidak sah kerana pengarah yang disampaikan juga adalah pengarah syarikat plaintif. Oleh itu defendan menghujahkan bahawa terdapat konflik kepentingan dan pengarah tersebut tidak berada di dalam kedudukan untuk menerima penyampaian bagi pihak defendan. Defendan juga menegaskan bahawa penyampaian kedua juga adalah tidak sah kerana alamat Jalan Pinang, Kuala Lumpur tidak lagi menjadi tempat perniagaan utama atau pejabat utama defendan pada hari penyampaian yang dikatakan telah disampaikan terhadap mereka. Oleh itu, defendan menegaskan bahawa oleh kerana penyampaian writ dan pernyataan tuntutan adalah tidak sah, penghakiman ingkar yang diperolehi adalah di luar aturan dan hendaklah diketepikan tanpa perlu memikirkan merit pembelaan defendan. Plaintif menghujahkan bahawa penyampaian pertama ke atas pengarah adalah menurut A 62 k 4(1)(c) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan penyampaian kedua di tempat perniagaan utama defendan adalah seperti yang terdapat di dalam carian di Suruhanjaya Syarikat Malaysia ('Suruhanjaya Syarikat') dan oleh itu plaintif tidak berpengetahuan bahawa

A defendan telah berpindah alamat dari alamat Jalan Pinang ke premis yang baru. Isu di hadapan mahkamah adalah, sama ada penghakiman ingkar yang diperoleh oleh plaintif adalah penghakiman yang sah dan teratur.

B **Diputuskan**, membenarkan rayuan dengan kos:

(1) Perkataan 'pengarah' di dalam A 62 k 4(1)(c) KMT tidak termasuk pengarah yang memegang jawatan yang sama di dalam dua syarikat yang berbeza seperti pengarah di dalam kes ini. Memandangkan C pengarah yang disampaikan ke atasnya juga adalah pengarah syarikat plaintif adalah wajar untuk disimpulkan bahawa beliau mestilah mengetahui guaman sivil ini yang dimulakan oleh plaintif terhadapnya. Oleh itu, terdapat situasi konflik kepentingan apabila beliau menerima penyampaian bagi pihak defendan dan oleh itu cara penyampaian D ke atas pengarah syarikat adalah tidak sah (lihat perenggan 17).

(2) Defendan menghujahkan bahawa carian syarikat setakat 3 Ogos 2006 telah menunjukkan tempat perniagaan utama defendan atau pejabat utama bukannya Jalan Pinang tetapi premis yang baru. Oleh itu adalah E wajar menyimpulkan bahawa pada tarikh penyampaian writ dan pernyataan tuntutan terhadap defendan pada 18 Julai 2006 pemberitahuan tempat perniagaan defendan yang rasmi masih di Jalan Pinang. Tambahan pula, defendan telah gagal untuk menjelaskan bukti penerimaan, terutama peneraan cop defendan di belakang writ. Dalam F keadaan tersebut, defendan telah gagal untuk memperlihatkan sama ada atau bila plaintif atau Suruhanjaya Syarikat telah diberitahu berkenaan dengan pertukaran alamat tempat perniagaan defendan. Terdapat prinsip bahawa jika sesuatu syarikat menukar pejabat berdaftarnya tanpa memberitahu pendaftar syarikat seperti yang dikehendaki oleh G Akta Syarikat 1965, oleh itu ianya tidak boleh bergantung kepada pertukaran untuk mematahkan penyampaian yang secara benarnya disampaikan di pejabat berdaftarnya yang lama, terutama apabila fakta bahawa pertukaran adalah tidak diketahui oleh plaintif semasa penyampaian. Prinsip ini sewajarnya terpakai kepada mana-mana H pertukaran alamat perniagaan syarikat yang mana defendan di bawah tanggungjawab perundangan untuk memberitahu Suruhanjaya Syarikat mana-mana perubahan alamat perniagaannya. Oleh itu cara kedua penyampaian yang dilakukan di tempat perniagaan utama atau pejabat utama defendan adalah sah menurut A 62 k 4(1)(c) KMT (lihat I perenggan 29–30).]

Notes

For cases on irregularity in service see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6196–6200.

For cases on judgment in default, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4150–4157.

Cases referred to

MUI Bank Bhd v Golden Hornbill Hotel Sdn Bhd [1993] 1 MLJ 290, HC (refd)

Pembinaan Masyuli Sdn Bhd v Mow Seng Housing & Land Development Sdn Bhd [1998] 1 MLJ 601, CA (refd)

Legislation referred to

Companies Act 1965

Rules of the High Court 1980 O 62 r 4(1)(b), O 62 r 4(1)(c),

Mohd Nor bin Md Derus (Nasir, Kenzin & Tan) for the plaintiff.
Munir bin Abdullah (Munir & Co) for the defendant.

Mohd Hishamudin J:

[1] This is an appeal by the plaintiff against the decision of the learned senior assistant registrar of 19 February 2008. In her decision the registrar allowed the defendant's application to set aside a default judgment dated 1 August 2006 entered by the plaintiff against the defendant by reason of the defendant's failure in filing its memorandum of appearance.

[2] I have allowed the appeal with costs.

[3] I shall now give my grounds.

[4] The writ of summons and statement of claim were filed on 3 July 2007. The plaintiff's claim against the defendant is for non-payment in respect of goods sold delivered by the plaintiff to the defendant. The sum claimed by the plaintiff against the defendant is RM416,120.50.

[5] The writ and the statement of claim were served on the defendant on 18 July 2006.

[6] The affidavit of service was filed on 1 August 2006. No appearance was entered by the defendant.

[7] Judgment in default of appearance was entered by the plaintiff on 1 August 2006.

[8] On 14 February 2007 the defendant filed an application by way of summons in chambers to set aside the default judgment on the ground that the judgment was irregularly obtained. The application was allowed by the senior assistant registrar.

[9] The plaintiff now appeals to the judge in chambers.

[10] The only issue in this appeal before me is whether the default judgment obtained by the plaintiff is a regular judgment. It is the submission of the defendant that the default judgment obtained was irregular; and since it was irregular, the default judgment ought to be set aside ex debito justitiae without the need to dwell into the merits of the defendant's defence.

[11] Learned counsel for the defendant submits that the default judgment was irregular because the service of the writ of summons and the statement of claim was not valid. Learned counsel argues that it was not valid because of the following reasons:

(a) in the case of the service of the writ and statement of claim on a director of the defendant by the name Lew Wen Teik ('Lew'), effected on 18 July 2006, it was invalid, as the said Lew was also a director of the plaintiff company; and

(b) in the case of the service of the writ and statement of claim on a staff of the defendant at an address known as Suite 9-3, Level 9, Wisma UOA II, Jalan Pinang, Kuala Lumpur, also effected on 18 July 2006, it was invalid as this premises was at the material time neither the registered office of defendant nor the principal place of business of the defendant.

[12] In the present case, to reiterate what has been said above, two modes of service were effected on the defendant, namely:

(a) personal service on a director of the defendant company; and

(b) personal service on a staff of the defendant's company at the principal place of business/principal office of the defendant company.

[13] In the case of (a) above, to repeat what has been said, the writ of summons and the statement of claim were personally served on a director of the defendant's company, namely, one Encik Lew Wen Teik.

[14] Learned counsel for the plaintiff contends that the service was valid as it is in accordance with O 62 r 4(1)(c) of the Rules of the High Court 1980 ('the RHC'), as Lew was a director of the defendant company. This provision states:

Rule 4 Service on corporation (O 62 r 4)

(1) Where an action is against a corporation, the writ may be served —

(a) ...

(b) ...

(c) by handing a copy of it to the secretary or to any director or other principal officer of the corporation;

[15] However, learned counsel for the defendant, on the other hand, submits that the service was not valid because Lew Wen Teik was not just a director of the defendant's company. He was also then a director of the plaintiff's company, a fact that is not in dispute. This being the case, Lew, argues counsel, notwithstanding the fact that he was a director of the defendant, was in no position to accept service on behalf of the defendant, as here, there was a conflict of interest on his part.

[16] It is also not disputed that Lew, having accepted service of the writ on behalf of the defendant company, did not take any action on the writ towards defending the defendant against the plaintiff's action; nor did he show the writ to the managing director of the defendant so that the latter could take the necessary defensive action.

[17] The defendant's counsel, in arguing that such service is not valid, however, did not furnish the court with any authority for his contention that the word 'director' in O 62 r 4(1)(c) does not include a director who wears two hats like the director of the defendant, Lew, in the present case. Lew, whilst he was a director of the defendant (the party being served and adversely affected by the service of the writ of summons), at the same time, he was also a director of the plaintiff (the party having an interest in ensuring that the writ of summons was served). Be that as it may, to my mind, there is no doubt that in the case of Lew, as he was also a director of the plaintiff, there is a conflict of interest situation, when he accepted service on behalf of the defendant. I think that it is fair to infer that as he was a director of the plaintiff he must have had knowledge of the plaintiff's institution of the present civil suit against the defendant.

[18] Based on the above undisputed facts and inference, I accept the defendant's submisssion that the service of the writ on Lew was not a valid service on the defendant by reason of the conflict of interest principle.

[19] However, there is another (and alternative) mode of service adopted by the plaintiff, that is, situation (b) as mentioned above — the service of the writ of summons and statement of claim by the plaintiff by leaving a copy of

these documents with a staff of the defendant at the principal place of business/principal office of the defendant. The writ of summons and the statement of claim were served on a staff of the defendant at a premises known as Suite 9-3, Level 9, Wisma UOA II, Jalan Pinang, 50450 Kuala Lumpur. According to the affidavit of service of the plaintiff affirmed by one Aizam bin Saberi, a clerk of the plaintiff's solicitors, Messrs Nasir, Kenzin & Tan, the writ of summons and the statement of claim were served on a staff of the defendant who acknowledged receipt of the writ and statement of claim by affixing the defendant company's chop and writing '*Received 18/7/06*' at the back of the writ of summons. The averments in this affidavit of service have never been disputed by the defendant (except on one point which I shall deal with shortly). In my judgment, on the authority of O 62 r 4(1)(b) of the RHC, and *Pembinaan Masyuli Sdn Bhd v Mow Seng Housing & Land Development Sdn Bhd* [1998] 1 MLJ 601, this mode of service, that is, service on a staff of the company at the principal place of business/principal office of the defendant (as opposed to the registered office of the company) is valid.

[20] Order 62 r 4(1)(b) states:

> Rule 4 Service on corporation (O 62 r 4)
>
> (1) Where an action is against a corporation, the writ may be served —
>
> (a) ...
>
> (b) by sending a copy of it by registered post addressed to the corporation at the office, or, if there be more offices than one at the principal office of the corporation, whether such office be situated within Malaysia or elsewhere;

[21] The case law authorities have interpreted r 4(1)(b) liberally (see *Malaysian High Court Practice*, 2001 Desk Ed, Vol 1, p 2025, para 62.4.2). One would have thought that the words '*by sending a copy of it by registered post addressed to the corporation at the office, or, ...*' imply that this limb (b) only applies to situations where the service is by way of *registered post*. However, *Pembinaan Masyuli* suggests that it is not the case: the provision also applies to *non-postal* service. In this case cited, the service was not by registered post. In fact it was not by post at all but by way of personal service on a clerk of the defendant company at the company's sales office (located in Seremban), which was not the registered office of the defendant company (located in Kuala Lumpur). Nevertheless, the Court of Appeal held the service was valid by reason of r 4(1)(b). Siti Norma Yaakob JCA (as she then was) in delivering the judgment of the court said (at pp 604–605):

In the court below, the respondents objected to the fact that the writ and statement of claim was not served at their registered office in Kuala Lumpur but at their sales office in Seremban.

We see no basis for such an objection as para (b) of r 4(1) allows service of process to be effected at any principal office of the respondents if they have more than one. In this case, the respondents' registered office, as stated in the writ itself, is at Suite 4.02, Tingkat 4, Bangunan Yayasan Selangor, 55100 Kuala Lumpur. They also maintained another office at the material time in Seremban at No 39, Tingkat 1, Jalan Yam Tuan, 70000 Seremban, Negeri Sembilan, this being their sales office in respect of the construction of the low cost houses that they had undertaken for the appellants. There is an admission by one of the respondents' directors in an affidavit affirmed on 12 January 1994 that at 3pm on 10 April 1993 (the same afternoon the writ and statement of claim was served), the respondents held a board meeting at the premises attended by a representative of the appellants to discuss the amount due to the appellants. The fact that such a board meeting was held at the sales office reinforces our finding that the premises was another of the respondents' principal office used by them to conduct their business.

[22] It is to be noted that the Court of Appeal in the above judgment also ruled that a principal office of a company need not necessarily be the registered office of the company. The above judgment seems to imply that a corporation can have more than one principal office, and that whether an office of a company/corporation is a principal office or not is a question of fact to be inferred from the facts of each case.

[23] In the case that is now before me, the affidavit of the plaintiff's process server clearly states that the Jalan Pinang (Kuala Lumpur) office was the principal place of business/principal office of the defendant company at the time of service. This assertion is never disputed by the defendant's affidavit, except that the defendant in their affidavits claims that they had moved out of their principal place of business/principal office from Jalan Pinang, Kuala Lumpur to Jalan Pelangi, Klang, in April 2006 and have moved into a new premises in Klang in May the same year (2006).

[24] The plaintiff had no knowledge that the defendant had moved their business address from the Jalan Pinang, Kuala Lumpur address to the new premises in Klang.

[25] Before filing the writ, in order to ascertain the principal place of business/principal office of the defendant, the plaintiff's solicitors did a search at the Companies Commission Malaysia (Companies Commission) on 29 March 2006. The search reveals that as at 29 July 2005 the registered

office of the defendant and the principal office/principal place of business of the defendant were as follows:

(a) Registered office:

No 13A,
Jalan SS 21/56B
Damansara Utama
47400 Petaling Jaya
Selangor

(b) Business Address:

Suite 9-3, Level 9
Wisma UOA II
Jalan Pinang
Kuala Lumpur

[26] In the present case the writ and statement of claim were filed on 3 July 2006. This is just about three months after the above company search was made. This address (the Jalan Pinang, Kuala Lumpur address) was mentioned in para 2 of the statement of claim as the 'business address' of the defendant. It is to be recalled that the service of the writ and statement of claim was effected on the defendant on 18 July 2006.

[27] The defendant disputes the plaintiff's assertion that the writ and statement of claim were served on the defendant at the principal place of business of the defendant. The defendant alleges that the Jalan Pinang, Kuala Lumpur address had ceased to be the principal place of business/principal office of the defendant on the day that the service was alleged to have been effected on them. The defendant maintains that on that day (18 July 2006) the principal place of business/principal office of the defendant was no longer at Jalan Pinang, Kuala Lumpur, but at their new premises, namely, at No 2 Jalan Pelangi, Off Jalan Batu Tiga Lama, 41300 Klang, Selangor; and that they had moved to this new premises in May 2006. The defendant's affidavit exhibits a search done on 6 February 2007 at the Companies Commission which shows that as at 3 August 2006 the principal place of business/principal office of the defendant was at No 2 Jalan Pelangi, Off Jalan Batu Tiga Lama, 41300 Klang, Selangor. Although the defendant claims that it had moved to the new principal place of business in May 2006, nonetheless, the defendant in its affidavits fails to mention as to whether the plaintiff or the Companies Commission was informed of the change of the

principal place of business of the defendant; and, if so, when was the plaintiff or the Companies Commission notified.

[28] As the defendant has failed to disclose as to whether or when the plaintiff or the Companies Commission was notified of the change of address of the defendant's place of business, and further considering that the defendant's company search only states the position (regarding the defendant's registered office address and place of business address) as at 3 August 2006, therefore, an inference may fairly be made that on the date of the service of the writ and statement of claim on the defendant at the defendant's principal place of business (that is, on 18 July 2006) the officially notified place of business of the defendant was still at the Jalan Pinang, Kuala Lumpur office. Moreover, the defendant has failed to explain the acknowledgement of receipt (particularly the stamping of the defendant's chop) that appears at the back of the writ.

[29] If I may add, there is the principle that a company that has changed its registered office without notifying the registrar of companies as required by the Companies Act 1965 cannot rely upon the change to defeat service that was properly effected at its former registered office, especially when the fact of the change is not known to the plaintiff at the time of service (see *MUI Bank Bhd v Golden Hornbill Hotel Sdn Bhd* [1993] 1 MLJ 290). In my view this principle equally applies to any change of the business address of the company as well as there is a legal duty for the defendant to notify the Companies Commission of any change of business address.

[30] In conclusion, the service effected at the principal place of business/principal office of the defendant at the Jalan Pinang, Kuala Lumpur office is valid by virtue of r 4(1)(b) of O 62 of the RHC.

[31] Since the service of the writ and statement of claim on the defendant at the Jalan Pinang premises is valid, it follows that the default judgment entered by the plaintiff is regular and valid. Accordingly, the appeal must be allowed with costs.

Appeal allowed with costs.

Reported by K Nesan